

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1478

To be argued by
Michael R. Wolford

77-1478, 77-1479

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-1478, 77-1479

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-vs-

DANIEL LEE RUCKER and EUGENE C. SMITH,

Defendants-Appealants.

APPEAL FROM A JUDGMENT OF CONVICTION
IN THE UNITED STATES DISTRICT FOR THE
WESTERN DISTRICT OF NEW YORK AT 76-181

BRIEF FOR THE DEFENDANT-APPELLANT
EUGENE C. SMITH

Michael R. Wolford, Esq.
Attorney for the Defendant-
Appellant Smith
2200 Lincoln First Tower
Rochester, New York 14603

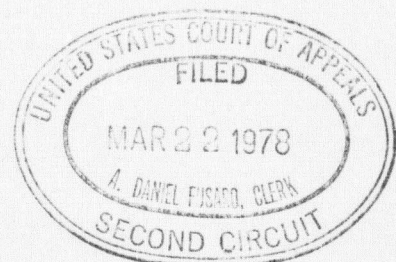


TABLE OF CONTENTS

	<u>Page(s)</u>
STATEMENT OF THE CASE	1
ISSUES PRESENTED.	3
FACTS	3
THE TRIAL	6
ARGUMENT.	8
POINT I The Court improperly denied defendant Smith's motion for a separate trial of Counts II and IV of the indict- ment	8
POINT II The Court's instructions to the jury were improper and constituted reversible error	13
POINT III The evidence presented was insufficient to sustain the conviction against the defendant Smith.	20
POINT IV The defendant Smith was denied his right to a fair trial	24
CONCLUSION.	25

CASES

	<u>Page</u>
<u>Glasser v. United States</u> , 315 U.S. 60 (1942)	20
<u>Schaffer v. United States</u> , 362 U.S. 511, 516 (1960). . .	10
<u>United States v. DeLoach</u> , 530 F. 2d 990, 994 (D.C. Cir. 1975) cert. den. 426 U.S. 909.	18
<u>United States v. DiStefano</u> , 555 F. 2d 1094, 1104 (2nd Cir. 1977)	20
<u>United States v. Floyd</u> , 555 F. 2d 45, 47 (2nd Cir. 1977)	16
<u>United States v. Kelley</u> , 349 F. 2d 720 (2nd Cir. 1965) cert. den. 384 U.S. 947	10
<u>United States v. Mardian</u> , 546 F. 2d 973 (D.C. Cir. 1976)	10
<u>United States v. Mariani</u> , 539 F. 2d 915, 919 (2nd Cir. 1976).	22
<u>United States v. Martin</u> , 525 F. 2d 703, 706 (2nd Cir. 1975) cert. den. 423 U.S. 1035	15

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 77-1478, 77-1479

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

DANIEL LEE RUCKER and EUGENE C. SMITH,

Defendants-Appealants.

APPEAL FROM A JUDGMENT OF CONVICTION
IN THE UNITED STATES DISTRICT FOR THE
WESTERN DISTRICT OF NEW YORK AT 76-181

BRIEF FOR THE DEFENDANT-APPELLANT
EUGENE C. SMITH

STATEMENT OF THE CASE

The defendant Eugene C. Smith was charged with two counts of bank robbery (18 USC § 2113(a) and 2) and conspiracy (18 USC § 371) in a four-count indictment that was filed on December 2, 1976 in the United States District Court for the Western District of New York. The defendant

Smith was charged with co-defendant, Daniel Lee Rucker, with aiding and abetting in the commission of a bank robbery at the First National Bank in Irondequoit, New York on September 29, 1976. Both defendants were also charged with conspiracy to rob this Bank with Edward Lee Brown, an unindicted co-conspirator. The defendant Rucker was charged with two additional counts of bank robbery and conspiracy with respect to the robbery of the Marine Midland Bank on May 14, 1976.

The defendant Smith was arraigned without counsel on December 6, 1976 and a not guilty plea was entered on his behalf. On December 9, 1976, the court appointed counsel for Smith, and on December 30, 1976 motions for discovery and inspection and a bill of particulars were filed. The jury trial of this matter commenced on October 24, 1977 and on October 27, 1977 the jury returned a verdict of guilty as to both defendants on all counts in the indictment.

Smith was sentenced by the Honorable Thomas C. Platt, Jr. on November 21, 1977 to a term of imprisonment of six years on count II of the indictment charging the defendant with bank robbery and to a term of five years on count IV of the indictment which charged him with conspiracy. Both sentences were ordered to run concurrently.

The defendant filed a notice of appeal from the judgment of conviction on November 21, 1977.

ISSUES PRESENTED

1. Whether the denial of the defendant Smith's motion for a severance of the counts in the indictment was an abuse of discretion by the trial court.

2. Whether the court's instructions to the jury constituted reversible error.

3. Whether the evidence presented at trial was sufficient to sustain the conviction against the defendant Smith for bank robbery and conspiracy.

4. Whether the denial of the defendants' request for daily copy of the accomplices' testimony deprived the defendants of a fair trial.

FACTS

On September 29, 1976, Edward Lee Brown entered the First National Bank at 1000 East Ridge Road, Irondequoit, New York at approximately 1:10 p.m. and handed the teller a note (353).^{*} According to the teller's statement to the FBI on the day of the robbery, the note requested "everything above \$50.00" (366-67). In response to this demand, the teller gave Mr. Brown \$1,063.00 (370). There-

* () refers to pages of the trial minutes contained in the record on appeal.

after, Brown was observed leaving the bank, getting on a ten-speed bicycle and riding it to the Gold Circle store which was located across the street (374). At that location, he was again observed entering the store (381) and within three minutes of his entry, approximately five police vehicles converged on the scene and surrounded the building (385-86). Brown was immediately apprehended by the police in the store while he was attempting to hide in a clothes rack (390).

Approximately four hours after his arrest, Brown gave a statement to the Irondequoit Police Department (D-AA)* in which he admitted his involvement in the robbery and denied that anyone assisted him. He also made reference in the statement to the fact that he was counting the money at the time of his apprehension to give to his brother (D-AA page 8).

Following his arrest, Brown was charged with bank robbery and remanded by the local authorities to the Monroe County jail. The following day, he was charged with a second robbery that allegedly occurred at Red Wing Stadium in Rochester, New York in July, 1976 (247).

While confined in jail, Brown became aware that his home was burglarized and he heard that the defendants

* (D-__) refers to defendants' exhibits and (G-__) refers to government exhibits.

Rucker and Smith were responsible. Brown admitted that he told people he would get even with Smith and Rucker for the alleged break-in (296).

On October 20, 1976, Brown was interviewed by agents of the FBI and in a statement taken on that same date (D-F) Brown claimed that the defendant Rucker and Smith urged him to commit the bank robbery and assisted him in this ill-fated venture.

On November 18, 1976, while still in custody, Brown testified before a federal grand jury and repeated his charges against the defendants (D-BB). He also stated to the grand jury that this was the only bank that he had ever robbed with Daniel Rucker (D-BB page 10) and furthermore, he had never done anything like this previously (D-BB page 8). Following his appearance before the grand jury, Brown plead guilty in state court on November 19, 1976 to a charge of robbery in the third degree which was considered in full satisfaction of the bank robbery and the alleged Red Wing Stadium robbery (249-252). Immediately thereafter, Brown was released from custody and placed on probation for a period of five years (251-252).

Based on Brown's testimony, the federal grand jury indicted Smith and Rucker for bank robbery and conspiracy.

THE TRIAL

At the trial, Brown was the chief prosecution witness against the defendants for the First National Bank robbery. He again repeated the charges against the defendants but also admitted that he was involved in another bank robbery at the Marine Midland Bank on May 14, 1976 with Rucker (238). He also admitted on cross-examination that he was involved in a pizza store robbery where a weapon was used in August, 1976 (253-258) and had been involved in robbing laundromats (267) and a purse snatching (268). Mr. Brown however was not charged with any of these crimes other than the bank robbery of September 29, 1976 for which he received probation.

According to Brown's testimony the involvement of Smith was limited to writing a note which was to be given to the teller at the bank and which was identified as Exhibit G-5. Despite the conspicuous presence of Mr. Brown, who at the time of the robbery weighed 250 pounds and was 6 foot 2 inches tall (240), and was wearing a red stocking cap, no other witnesses were presented to corroborate Brown's testimony regarding the presence of the two defendants with him in and around the Gold Circle store before and after the robbery. In addition, no handwriting expert

was presented by the Government to substantiate the claim that Smith wrote the note in question.

The only other witness to be presented by the Government in an attempt to buttress Brown's testimony against the defendant Smith was Desmond Hall (391). According to Hall, he observed Rucker and Michael Smith (the brother of Eugene Smith) running through a parking lot in the early afternoon of September 29, 1976 in the Hudson Avenue area. Thereafter Hall observed Michael Smith counting money in the Smith family apartment and Rucker and Eugene Smith were also present (394-95). On cross-examination, Hall, admitted that his recollection of the events surrounding the afternoon of September 29 were better when he was first interviewed by the police than they were at trial (450-451) and in that original statement he made no mention of Eugene Smith being present in the basement apartment (452). Both defendants testified and denied any involvement in the robbery.

ARGUMENT

POINT I

THE COURT IMPROPERLY DENIED DEFENDANT SMITH'S MOTION FOR A SEPARATE TRIAL OF COUNTS II AND IV OF THE INDICTMENT

Defendant Smith's motion for discovery and inspection requested, "all written or recorded statements made by either defendant...." A-33)* In response to this request, the government advised that the only statements that it had in its possession were those taken at the time of the arrest which occurred on December 6, 1976 (A-42). The government also supplied defense counsel with the reported criminal records of both defendants.

Following the jury selection on October 17, 1977, the commencement of the trial was adjourned to Monday, October 24, 1977. On Friday, October 21, 1977, the government attorney supplied defense counsel with a trial memorandum which referred to a certificate of conviction of the defendant Rucker which dealt with a bank robbery on January 7, 1976 at the same bank (Marine Midland on Hudson Avenue) which was the subject of counts I and III of the indictment. In the government's trial memorandum, it advised the court and counsel that it was intending to introduce this certificate of conviction (G-20) in its direct case which reflected

* (A-) refers to pages of Defendants' joint appendix.

Rucker's plea of guilty in Monroe County Court for the crime of grand larceny third degree on May 3, 1976. Attached to the proposed exhibit were statements made by the defendant Rucker which included references to his assisting others in the commission of the robbery. It was the government's intention to introduce this certificate and the accompanying statements in order to reflect the motive that the defendant Rucker had to send other people into banks for criminal purposes.

On Monday, October 27, the defendant Smith moved for a severance of the counts of the indictment dealing with the Marine Midland bank robbery pursuant to Rule 14 of the Federal Rules of Criminal Procedure (35-37).

This motion was based on the fact that it was not until completion of the jury selection that the government made defense counsel aware of Rucker's prior conviction at the same bank. Furthermore, the government was intending to introduce a statement from the defendant Rucker regarding his prior crime despite the government's previous claim that it had no other statements of Rucker. In addition, the introduction of this conviction was a clear attempt to buttress the uncorroborated testimony of Edward Lee Brown who was expected to claim that both defendants had persuaded him to rob the First National Bank on September 29, 1976.

The court denied defendant Smith's motion on the grounds that it was untimely, and that any prejudice would be eliminated by appropriate instructions (50). The court erroneously concluded that since the government had supplied defense counsel with a listing of Rucker's convictions, this served as ample notice of the government's intention to offer in evidence the conviction of Rucker at the same bank and the accompanying confession. The so-called criminal record listing however (attached to the government's response to defendants' motions for discovery) (A-56) made no reference to the bank in question, but simply referred to a conviction of Rucker for grand larceny third on July 6, 1976.

It is evident that a trial court has a continuing duty at all stages of the trial to grant severance if prejudice to a particular defendant is made manifest. Schaffer v. United States, 362 U.S. 511, 516 (1960), United States v. Kelley, 349 F.2d 720 (2nd Cir. 1965) cert. den. 384 U.S. 947, United States v. Mardian, 546 F.2d 973 (D.C. Cir. 1976). Furthermore, with the introduction of the prior conviction and confession, the weight of the evidence against the defendant Rucker became far greater and more damaging than against Smith and under these circumstances the requested severance was the appropriate remedy.

The mere fact that the defendant Smith chose not to file a motion for severance prior to jury selection did not estop him from moving at a subsequent time, when newly discovered facts warranted such a motion, nor did it relieve the court of its "continuing duty." The submittal by the government of a so-called criminal record sheet cannot be conceived to have been adequate notice to defense counsel that the government would introduce the conviction and confession of Rucker for a previous bank robbery.

The defendant Smith's prejudicial position was plainly demonstrated when the government prosecutor in his opening remarks repeatedly referred to both defendants in a fashion that would indicate that the defendant Smith was involved in both bank robberies. These references included the following:

"As to counts two and four, the Grand Jury charged, and I am going to prove that Danny Rucker and Eugene Smith, the other defendant committed the same crimes only this time in the fall of 1976. This time it was a different bank, the same neighborhood the First National Bank in Georgetown Plaza, Ridge Road East. I am going to prove that on September 29, 1976 they conspired with a man by the name of Edward Brown. This time they wanted Brown to go in and take the bank money and he did." (60)

Furthermore the prosecutor stated:

"...Well, I am going to call to the witness stand Robert Rivera, the man who actually went into the Marine Midland Bank. I am

going to call Edward Brown the man who actually robbed the First National Bank, the two people that Rucker and Smith got to go in and rob these banks.

Mr. Wolford: I object to the reference to Mr. Smith in the Marine Midland Bank. There is no charge that he did it or any proof." (61)

Despite this objection and ruling by the court that it was a misstatement, the prosecutor continued:

"Then we move on to September 29, 1976, when Rucker and Eugene Smith this time convinced ... excuse me this time Rucker convinces and this time with Eugene Smith they convince Edward Brown to enter the First National Bank in downtown plaza." (62)

Despite further objections to the argumentative opening of the prosecution, the government attorney continued to bring the defendant Smith within the ambit of both bank robberies:

"Rucker and Smith got the neighborhood kids to go out and rob the neighborhood bank." (64) (Emphasis added)

The same type of prejudicial comment regarding Smith was also contained in the summation of the government:

"Ladies and gentlemen, the evidence in this case proves beyond a reasonable doubt that these defendants caused the other people to enter these banks with intent to rob them." (660)

The prosecutor continued:

"Then we go to September 29. Rucker and Smith this time. This time they psyche up Biggs.

. . .

Rucker and Smith, they psyche up Biggs this time." (662)

This repeated reference by the prosecutor and his argument reflected an attempt to lump the defendant Smith with all the prior misconduct of the defendant Rucker. The government's intent was even more blatant when the prosecutor compared the prior conviction of Rucker to the conduct of both Rucker and Smith during the alleged robbery at the First National Bank. (675-76)

The government's use of the prior conviction of defendant Rucker immeasurably affected the question of the defendant Smith's guilt or innocence. Not only did it have the effect of having the defendant Smith charged with both bank robberies but it also buttressed the uncorroborated testimony of Edward Lee Brown. The trial court's refusal to grant the defendant's motion for severance was a clear abuse of discretion.

POINT II

THE COURT'S INSTRUCTIONS TO THE
JURY WERE IMPROPER AND CONSTITUTED
REVERSIBLE ERROR.

The defendant Smith submitted to the court his request to change on October 25, 1977. These requests were separately numbered and contained inter alia appropriate instructions on reasonable doubt (2) a witness's testimony

under a grant of immunity (4) and the testimony of an accomplice (5). (A-67-73) On the following day, the court advised counsel that it would give the reasonable doubt charge (429) and a standard accomplice charge but it would not give an immunized witness charge (430).

When the court did instruct the jury, it failed to give the requested reasonable doubt charge as it said it would, nor did it give the immunized witness charge as requested. Rather, it gave an erroneous charge with respect to the special interest of the defendants and their motive for false testimony. This latter charge was not requested by the government.

The separate errors that were contained in the court's instruction to the jury are analyzed below:

(1) The court committed error in charging the jury with respect to the greater interest of the defendant.

The court's charge on this subject was as follows:

The deep and personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of a defendant is of a character possessed by no other witness and is, therefore, a matter which may seriously affect the credence that should be given to his testimony (780).

Both defense counsel took exception to this portion of the charge (788-789), but the court refused to alter it.

Although this court refused to reverse the conviction in United States v. Martin 525 F.2d 703, 706 (2nd Cir. 1975) cert. den. 423 U.S. 1035 where a similar charge was given, there are significant differences between the cases.

To begin with, in the Martin case, defense counsel took no exception to the special interest charge and furthermore, the tenure of the Martin charge was notably different.

In the present case, the court highlighted and characterized the motive for false testimony by stating "...the greater the interest the stronger the temptation...." In addition the Court stated regarding the defendant's interest "...a matter which may seriously affect the credence that should be given to his testimony." None of this language was contained in the Martin charge.

More importantly, the court in the Martin case added the further statement which was absent in the present charge:

However, I want to say this with equal force to you - however, it by no means follows that simply because a person has a vital interest in the end result, that he is not capable of telling a truthful and straightforward story.

It is for you to decide to what extent, if at all, defendant's interest has affected or colored his testimony (525 F.2d at p. 706 note 3).

In the Martin case, defense counsel not only failed to object but in his summation dealt in some detail with the motive a defendant has to lie and the anticipated instructions regarding that motive. (525 F. 2d at p. 706 note 4).

In the present case, the charge to the jury was internally inconsistent with respect to the testimony of the defendant since on one hand the court instructed the jury as follows:

A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness."
(780)

Following that proper statement, the court then proceeded to instruct the jury that the defendant's testimony should be judged in a different fashion based upon the strong interest he has to present false testimony.

In this Court's recent opinion in United States v. Floyd, 555 F.2d 45, 47 (2nd Cir. 1977), it approvingly referred to the Martin charge but it specifically made note of the need to state that:

"...a defendant's vital interest in the outcome of his trial is not inconsistent with the ability to render truthful testimony"
(555 F.2d at p. 47. Note 4).

This type of cautioning language was totally absent from the Court's charge in the present case and as such it constitutes clear grounds for reversal.

In addition, the charge was even more damaging since the court refused to give a charge with respect to the special interest that the witness Edward Lee Brown had in giving false testimony.

It was plain error to refuse to make note of Brown's interest while at the same time highlighting the interest of the defendants and concluding that they had a greater interest in submitting false testimony than any other witness.

(2) The court also committed error when it refused to give the requested charge dealing with a witness who has been granted immunity.

The defendant Smith's request #4 was directed at the testimony of an individual who has been granted immunity from prosecution. The critical portion was as follows:

Such testimony, however, should be examined by you with greater care than the testimony of an ordinary witness. You should consider whether the testimony may be colored in such a way as to further the witness's own interest, for a witness who realizes that he may procure his own freedom by incriminating another has a motive to falsify. After such consideration, you may give the testimony of the immunized witness such weight as you feel it deserves. (A-71)

This particular portion was proper and previously approved in United States v. DeLoach, 530 F.2d 990, 994 (D.C. Cir. 1975), cert. den. 426 U.S. 909.

The court however refused to give the charge claiming that it was inappropriate since Brown had already procured his freedom before he testified (431).

The court was mistaken on this point since the witness testified before the Federal Grand Jury in this case on November 18, 1976 (D-BB) and was advised that he had immunity from any federal prosecution. On that date he was still confined in Monroe County Jail and it was not until the following day after his plea of guilty to grand larceny third degree that he was released. Furthermore, he was not being prosecuted for the pizza store robbery to which he admitted nor his involvement in the Marine Midland Bank robbery that occurred in May 1976. It was evident that Edward Lee Brown had procured his freedom by agreeing to testify against the defendants. In view of that fact, it was critical that the jury be apprised of the witness's interest and the care that was necessary in evaluating his testimony. The court's refusal to grant the defendant's request coupled with its directing attention to the defendants' interest, compounded the error and warrants reversal.

(3) The court erred on the reasonable doubt charge.

The court advised counsel that it would give the requested charge on reasonable doubt (429) but the charge did not include the following request:

So if the jury, after careful and impartial consideration of all the evidence in the case, has a reasonable doubt that a defendant is guilty of the charge it must acquit. If the jury views the evidence in the case as reasonably permitting either of two conclusions -- one of innocence, the other of guilt -- the jury should of course adopt the conclusion of innocence." (A-69)

The court advised counsel that it would not give the request since it had already been covered (790-791) but a search of the record reveals that it was not given. The refusal of a court to grant this simple request was error.

(4) The charge was erroneous on the jury's consideration of the defendant's conduct.

The court charged in pertinent part as follows:

"Conduct of a defendant, including statements knowingly made and acts knowingly done, upon being informed that a crime has been committed, or upon being confronted with a criminal charge, may be considered by the jury in the light of all other evidence in the case and in determining guilt or innocence, consciousness of guilt or of course in determining the innocence." (781) (emphasis added)

This portion of the charge was directed at the defendant's testimony (658-60) and was excepted to by

defense counsel (788-90). By including a reference to "determining guilt or innocence..." rather than simply "evidence of consciousness of guilt" the court repeated the error found by this court in United States v. DiStefano, 555 F.2d 1094, 1104 (2nd Cir. 1977), and this alone constitutes reversible error.

In conclusion, the jury was instructed to judge the defendants with greater care and scrutiny than any other witness and in a very real sense the burden of proof was shifted to the defendants.

POINT III

THE EVIDENCE PRESENTED WAS INSUFFICIENT TO SUSTAIN THE CONVICTION
AGAINST THE DEFENDANT SMITH

Although the defendant is aware that the Court must view the evidence in a light most favorable to the government, Glasser v. United States, 315 U.S. 60 (1942), it is respectfully submitted that even given this heavy burden, the defendant Smith is entitled to a new trial, or in the alternative, a judgment of acquittal. In reviewing this question, it is essential to analyze the testimony of Edward Lee Brown and Desmond Hall.

(A) Testimony of Edward Lee Brown

According to the accomplice Edward Lee Brown, a plan was developed to rob the First National Bank on September 29, 1976. In reviewing his testimony, it is apparent that the defendant Rucker was the central if not the only force in carrying out the alleged conspiracy. In particular, it was Rucker who showed Brown a rifle to be used (213); who gave Brown a metal cutter and told him how to use it (216), and who told Brown to use a bicycle and provided a bicycle for the plan (217). Furthermore, it was Rucker who told Brown how to use the bike and where to leave it (226-227), and what Brown was supposed to do in the Bank (229). In addition, it was Rucker who gave Brown the glasses to be used in the robbery (235), and the cap (236). The one item that Smith is alleged to have done, according to Brown, is to have written a second note to be given to the teller, and which was identified as G-5. Rucker had allegedly written the first note; and according to Brown, the first note had something to do with "give me all your twenties, or something like that" (274). (As can be seen by Exhibit G-5, there is no reference to any denominations.)

According to the teller's statement on the day of the bank robbery, the note demanded "everything above \$50.00." (366-67)

Although this note was the key item connecting Smith with the bank robbery, there was no expert witness provided by the government to testify that Smith was the author of it.

Aside from the note, the evidence against Smith made him out to be no more than a spectator to the events surrounding the robbery by Brown and as such, his mere presence at the scene was insufficient. United States v. Mariani, 539 F 2d 915, 919 (2d Cir. 1976).

Furthermore, despite the conspicuous appearance of Brown and his wearing a red ski cap in September, there was no witness who appeared and testified on observing the defendants and Brown together as they proceeded to the Gold Circle store and met after the robbery.

(B) Testimony of Desmond Hall

The only witness presented by the government in an attempt to substantiate the testimony of Edward Lee Brown resulted in testimony favorable to the defendant Smith. In particular, Desmond Hall advised that rather than Eugene Smith who he saw with Daniel Rucker in the early afternoon of September 29, 1976, it was Michael Smith (the brother of Eugene) who he observed running with Rucker (393). Hall did not see Smith until he went to Michael Smith's apartment basement where he observed Daniel Rucker, Michael Smith, and

Gene Smith (394). He also overheard Michael Smith and Daniel Rucker say there was a need to have someone go up to the store and get the bike (396). In addition, the witness observed Michael Smith hiding the money above the heater, shutting all the doors, and locking the windows whereas Eugene Smith was claimed to have simply gone upstairs and left the house (397). More significantly, upon cross-examination, the witness Hall advised that when interviewed by the police following the bank robbery, his recollection of the events was better than at trial, and at that time, he told the police that Peter Smith was in the basement apartment rather than Eugene Smith (451-452).

This witness's reference to Michael Smith was significant in view of the fact that Brown admittedly was a friend of Michael Smith. This friendship was revealed when he refused to disclose Michael Smith's involvement in another unrelated crime until the court directed him to answer under threat of contempt (308-317). Brown's motive to implicate Eugene Smith in place of his brother, Michael, was also evident since according to Brown, Eugene Smith and Daniel Rucker were responsible for a break-in at his apartment while he was in jail, and he advised people that he would get even with them for this burglary (296).

This motive coupled with the inconsistent statements given by Brown following the arrest (D-AA) and before

the federal grand jury, (D-BB) and his further involvement in numerous criminal activities (238, 253-268) rendered his testimony unbelievable. In reviewing the evidence in a light most favorable to the government, it is respectfully submitted that the evidence was insufficient to sustain the conviction against the defendant Eugene Smith.

POINT IV

THE DEFENDANT SMITH WAS DENIED HIS
RIGHT TO A FAIR TRIAL

The defendants both requested a daily copy transcript of the two accomplices' trial testimony. This would have included Roberto Rivera and Edward Lee Brown. (128) The request was well founded since it appeared that the accomplice testimony was uncorroborated and numerous inconsistencies were anticipated to develop. The daily copy would not only be essential to the cross-examination of these witnesses, but would be an effective tool in the summations to the jury. Since both counsel were appointed, the Court's authorization was needed to order daily copy. The Court refused this request and stated that he would only order it if the government would likewise order it (128). Since the government refused to order it, the Court denied defendants' request.

It was obviously not in the government's interest to order daily copy since it would be used by defense counsel to cross-examine the government's two chief witnesses. In view of the importance of having an accurate transcript of the accomplices' testimony, it was an abuse of discretion to deny defendants' request.

CONCLUSION

For the reasons above stated, it is respectfully requested that the judgment of conviction be vacated and the indictment dismissed or, in the alternative, a new trial be granted the defendant Smith.

Dated: Rochester, New York
March 17, 1978

Respectfully submitted,

Michael R. Wolford
Attorney for the Defendant-
Appellant Smith
Office and Post Office Address
2200 Lincoln First Tower
Rochester, New York 14603
Telephone (716) 546-8000

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOS. 77-1478, 77-1479

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

DANIEL LEE RUCKER and EUGENE C. SMITH,

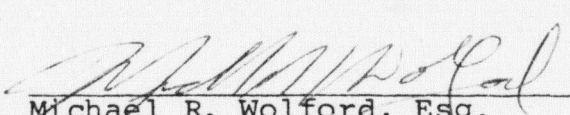
Defendants-Appellants.

CERTIFICATE OF SERVICE

I certify that on March 20, 1978, I caused eight (8) copies of the BRIEF FOR THE DEFENDANT-APPELLANT EUGENE C. SMITH and eight (8) copies of the JOINT APPENDIX FOR THE DEFENDANTS-APPELLANTS to be served by mail, postage, prepaid upon the following:

Eugene C. Welch, Esq.
Assistant U.S. Attorney
233 U.S. Courthouse
100 State Street
Rochester, New York 14614

David G. Larimer, Esq.
240 Reynolds Arcade Building
Rochester, New York 14614



Michael R. Wolford, Esq.
Attorney for Defendant-Appellant
Eugene C. Smith
2200 Lincoln First Tower
Rochester, New York 14603
(716) 546-8000